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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

12 DUKE ADVANTAGE, LLC, a company,
13 Plaintiff

14 v.
15 CORMATRIX CARDIOVASCULAR,
16 INC., a corporation, ROBERT G.
17 MATHENY, an individual, DAVID B.
CAMP, an individual, and BEECHER
LEWIS, an individual.

Case No. C072950 RMW
Santa Clara Superior
Court Case No. 107 CV085326

**REPLY MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS**

Date: August 3, 2007
Time: 9:00 a.m.
Courtroom: 6
Judge: Hon. Ronald M. Whyte

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1 CorMatrix Cardiovascular, Inc. (“CorMatrix”), Robert G. Matheny (“Matheny”), David B.
 2 Camp (“Camp”), and Beecher Lewis (“Lewis”) (collectively, Matheny, Camp, and Lewis are
 3 referred to as the “Individual Defendants”) submit this Reply in support of their motion to dismiss
 4 for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3) (“Rule 12(b)(3)”).

5 **I. INTRODUCTION**

6 Duke Advantage, LLC (“Plaintiff”) has failed to satisfy its substantial evidentiary burden
 7 of showing that enforcement of the mandatory forum selection clause in the subject Subscription
 8 Agreement would be unreasonable and thus not enforceable. The subject forum selection clause
 9 is presumptively valid and enforceable on its face and Plaintiff has failed to overcome this
 10 presumption.

11 Plaintiff’s argument that the forum selection clause is unreasonable because it violates the
 12 California public policy articulated in Corporations Code Section 25701 fails because
 13 enforcement of the forum selection clause cannot, under the facts and circumstances of this case,
 14 in any way contravene that public policy. Further, the California appellate authority that Plaintiff
 15 relies on for this proposition relates to choice of law considerations which are not before this
 16 Court on this motion to dismiss. This argument also fails because Plaintiff admits that it has not
 17 asserted any claim under California’s Corporate Securities Law of 1986. Hence, § 25701 cannot
 18 be implicated by enforcement of the forum selection clause since no securities claim exists.

19 Further, Plaintiff’s attempt to fabricate a “conflict” between the Subscription Agreement
 20 and the Stockholders Agreement also fails because the Subscription Agreement -- or the stock
 21 purchase and sale agreement -- is the only contract whose terms and conditions relate to or
 22 concern the claims that Plaintiff has asserted in this dispute. In contrast, Plaintiff has asserted no
 23 claim that relates to, concerns or arises under the terms and conditions of the Stockholders
 24 Agreement, which only imposes restrictive covenants on the transfer of CorMatrix stock in the
 25 after market. Further, no purported “conflict” can exist because, based upon their clear focus,
 26 purpose and scope, it is apparent that these two agreements each serve a role that is distinctly
 27 different from one another. Therefore, there is no “conflict” and this argument has no relevance
 28 to the issues in this litigation.

1 Finally, defendants' alleged contacts with California are of no relevance to the Court's
 2 determination of whether the subject forum selection clause is reasonable and fully enforceable.
 3 In this regard, the Court only considers the validity and enforcement of the clause and whether
 4 enforcement of the clause would be unreasonable, not whether the defendants have any "ties" to
 5 the state in which the plaintiff brings suit.

6 The Court should accordingly grant the instant motion to dismiss for improper venue.

7 **II. ARGUMENT**

8 **A. Plaintiff Bears The Burden Of Overcoming The Presumption Of Validity Of**
The Forum Selection Clause.

10 Plaintiff does not dispute that the forum selection clause is presumptively valid and that it
 11 has the burden of demonstrating through competent and admissible evidence that enforcement of
 12 the forum selection clause would be unreasonable.¹ Plaintiff's Opposition Memorandum
 13 ("Opp'n") at 6:12-14. Under Ninth Circuit authority, Plaintiff "has the burden 'to show that trial
 14 in the contractual forum would be so gravely difficult and inconvenient that he will for all
 15 practical purposes be deprived of his day in court.'" *Manetti-Farrow, Inc. v. Gucci America, Inc.*,
 16 858 F.2d 509, 515 (9th Cir. 1988) (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18
 17 (1972)). Plaintiff can also show that enforcement of the forum selection clause is unreasonable
 18 because it "would contravene a strong public policy of the forum in which the suit is brought."
 19 *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996) (citing *The Bremen*, 407 U.S.
 20 at 15).

21 **B. Federal Procedural Law Controls And The Burden Remains On Plaintiff To**
Show How Enforcement Of The Forum Selection Clause Is Unreasonable.

23 As the Ninth Circuit has made clear, federal procedural law, not state procedural law,
 24 controls and governs the enforcement of a forum selection clause. *Manetti-Farrow*, 858 F.2d at
 25 513 ("We conclude that the federal procedural issues raised by forum selection clauses
 26 significantly outweigh the state interests, and the federal rule announced in *The Bremen* controls

27
 28

¹ Plaintiff concedes that the mandatory forum selection clause applies to the claims against the
 Individual Defendants and to the tort claims against all of the defendants.

1 enforcement of forum clauses in diversity cases.”). Plaintiff acknowledges as much. *See Opp’n*
 2 at 8:4-6 (noting that “this Court is not bound by California procedural law . . .”).

3 Notwithstanding this dispositive concession, Plaintiff appears to go on and suggest that
 4 California case law somehow places the burden on CorMatrix to show that enforcement of the
 5 forum selection clause would not diminish any of Plaintiff’s rights under California law. *Opp’n*
 6 at 6:16-21 (citing *Wimsatt v. Beverly Hills Weight Loss Clinics Int’l Inc.*, 32 Cal. App. 4th 1511,
 7 1523 (1995)). However, *Wimsatt* is not applicable to this case because its analysis was carefully
 8 confined to franchise agreements. *See Wimsatt*, 32 Cal. App. 4th at 1523 n.8 (“And, for the same
 9 reason, our remarks here are necessarily confined to forum selection clauses in franchise
 10 agreements.”). Moreover, *Wimsatt* is not controlling on this Court because it involves California
 11 procedural law, not federal procedural law. *See id.* at 1514 (explaining that federal procedural
 12 law is different than California procedural law as to enforcement of forum selection clauses);
 13 *Manetti-Farrow*, 858 F.2d at 513 (federal procedural law controls enforcement of a forum
 14 selection clause).

15 As such, under controlling Ninth Circuit authority, the burden of persuasion never shifts to
 16 the moving party. Instead, the burden remains entirely upon the non-moving party to show that
 17 enforcement of the forum selection clause is unreasonable. *Murphy v. Schneider Nat’l, Inc.*, 362
 18 F.3d 1133, 1140 (9th Cir. 2004) (“The party challenging the [forum selection] clause bears a
 19 ‘heavy burden of proof’ and ‘must clearly show that enforcement would be unreasonable and
 20 unjust, or that the clause was invalid for such reasons as fraud or overreaching.’”) (quoting *The
 21 Bremen*, 407 U.S. at 15); *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 497 (9th Cir. 2000)
 22 (stating the same). It is beyond cavil that Plaintiff has completely failed to satisfy this substantial
 23 burden.

24 **C. Plaintiff Has Not Demonstrated That It Would Be Unreasonable To Enforce**
The Forum Selection Clause.

25 **1. Enforcement of the forum selection clause does not contravene the**
26 public policy articulated in California Corporations Code Section
25710.

27 Plaintiff asserts that enforcement of the forum selection clause in the Subscription

1 Agreement would contravene a “strong” public policy articulated in Corporations Code Section
 2 25710. Opp’n at 8:5-6. This contention is based exclusively upon *Hall v. Superior Court*, 150
 3 Cal. App. 3d 411 (1983), which refused to enforce a forum selection clause only because its
 4 associated choice of law clause would contravene the non-waiver policy of § 25710:

5 [W]e believe the right of a buyer of securities in California to have
 6 California law and its concomitant nuances apply to any future
 7 dispute arising out of the transaction is a “provision” within the
 8 meaning of section 25701 which cannot be waived or evaded by
 9 stipulation of the parties to a securities transaction. Consequently,
 we hold the choice of Nevada law provision in this agreement
 violates section 25701 and the public policy of this state.

10 *Id.* at 418.

11 A careful review of the facts and circumstances at issue in *Hall* will demonstrate that it is
 12 distinctly dissimilar from the instant case to the extent that the public policy of § 25701 cannot be
 13 contravened by the facts of this case. The *Hall* court was obviously concerned by the facts and
 14 events of its sales transactions which on their face indicated that the sellers of the securities had
 15 attempted to “evade” the California Corporate Securities Law by “transporting the parties across
 16 the State border” in order to close the transaction in Nevada. *Id.* at 417-418. Those sellers further
 17 attempted to waive or evade the California securities laws through a stipulation as to certain
 18 transactional facts. The court rejected this obvious, evasive scheme and stated that § 25701 “was
 19 intended to and will preclude any evasion” of the California Corporate Securities Law. *Id.* at 417.

20 It is undisputed that the purchase and sale transaction at issue in the instant litigation
 21 contains no facts or allegations which charge, or even suggest, that defendants have engaged in
 22 any conduct that was designed to “evade” or avoid any of the “nuances” in the California
 23 securities laws. Indeed, in this regard it is significant to note that the Plaintiff’s Complaint is
 24 totally devoid of any claims arising under the California securities statutes. Moreover, it is
 25 further undisputed that the Georgia securities laws are equivalent to the California securities laws
 26 in all material respects (see Declaration of Angela Frazier in Support of Motion to Dismiss
 27
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1 (“Frazier Decl.”) filed herewith).² As such, under the Georgia securities laws, Plaintiff will not
 2 be “deprived of his day in court.” *Manetti-Farrow*, 858 F. 2d at 515 (internal quotation marks
 3 omitted). Therefore, enforcement of the subject forum selection clause cannot contravene the
 4 public policy of § 25701, and it is not unreasonable for this Court to enforce that provision and
 5 grant the instant motion to dismiss.

6 Significantly, another California district court has considered and rejected the specific §
 7 25701 public policy argument now before this Court. In *Pong v. American Capital Holdings,*
 8 *Inc.*, 2007 U.S. Dist. LEXIS 18727 (E.D. Cal. Feb. 28, 2007), the plaintiff alleged that the
 9 defendants had made false representations in connection with an investment and filed suit for
 10 breach of contract, fraud, and claims for rescission and damages under Corporations Code Section
 11 25501.³ *Pong*, 2007 U.S. Dist. LEXIS 18727 at *2-4. The plaintiff then sought to avoid
 12 enforcement of mandatory forum selection clauses in promissory notes by arguing the non-waiver
 13 policy of § 25701. *Id.* at *13. The plaintiff asserted that “California has a strong public policy
 14 against waiver of the right to bring actions for rescission or for damages for securities fraud in a
 15 California court under California Corporations Code Section 25701.” *Id.* at *13 (internal
 16 quotation marks omitted).

17 The *Pong* court rejected the § 25701 argument because the language of the statute did not
 18 specifically address waiver and venue. *See id.* (Plaintiff “fail[ed] to explain how this provision
 19 ‘declares’ that enforcement of the forum selection clause would violate California public policy.
 20 The provision, does not, specifically address waiver and venue.”). The court further observed
 21 that, unlike the franchise statute in *Jones v. GNC Franchising, Inc.*, 211 F.3d 495 (9th Cir. 2000),
 22 which specifically provided that “[a] provision in a franchise agreement restricting *venue* to a
 23 forum outside this state is void with respect to any claim arising under or relating to a franchise
 24 agreement involving a franchise business operating within this state,” § 25701 expresses no such

25
 26 ² Under the Georgia Securities Act of 1973, specifically O.C.G.A. sections 10-5-12 and 10-5-14, a
 27 purchaser of securities can sue for unlawful practices, including misrepresentation and fraud, and
 can recover monetary damage for such practices. *See* Frazier Decl., ¶ 3 and Exhibit A.

28 ³ Defendants note that the plaintiff in *Pong* specifically alleged a claim under the Corporate
 Securities Law of 1968.

1 strong public policy regarding venue. *Pong*, 2007 U.S. Dist. LEXIS 18727 at *13-14; Cal. Bus.
 2 & Prof. Code § 20040.5 (emphasis added). *See also Multimin USA, Inc. v. Walco Int'l Inc.*, 2006
 3 U.S. Dist. LEXIS 33624, *16-17 (E.D. Cal. Apr. 7, 2006) (distinguishing the statute at issue in
 4 *Jones* which “specifically held that restrictions on venue were void in disputes arising out of
 5 forum selection clauses;” while California has law relating to breach of contract and trade secrets,
 6 “this body of law is unrelated on its face to venue”).

7 Moreover, a number of other Ninth Circuit district courts have also considered the issue of
 8 whether enforcement of a forum selection clause would contravene a state’s “strong” public
 9 policy and have enforced the forum selection clause. *See, e.g., Laurel Vill. Bakery LLC v. Global*
 10 *Payments Direct Inc.*, 2006 U.S. Dist. LEXIS 73663, *7, 16-17 (N.D. Cal. Sept. 25, 2006)
 11 (granting the defendants’ motion to dismiss for improper venue and rejecting the plaintiff’s
 12 argument that enforcement of a forum selection clause would violate Georgia law which,
 13 according to the plaintiff, did not allow for contractual venue provisions; the court determined
 14 that the Georgia cases that the plaintiff relied upon were “limited to cases involving intrastate
 15 disputes between Georgia companies” and because the dispute at issue involved an interstate
 16 dispute, plaintiff had failed to overcome the presumption of validity of the clause); *Nureau Ink,*
 17 *LLC v. Zomba Recording, LLC*, 2006 U.S. Dist. LEXIS 87240, *7 (S.D. Cal. Nov. 29, 2006)
 18 (granting the defendant’s motion to dismiss for improper venue and rejecting the plaintiffs’
 19 argument that enforcement of a forum selection clause would contravene California public policy
 20 because “enforcement of the clause would deprive Plaintiffs of certain remedies available only in
 21 California”); *Multimin USA.*, 2006 U.S. Dist. LEXIS 33624 at *16-19 (granting the defendants’
 22 motion to transfer because the plaintiffs had failed to show that enforcement of a forum selection
 23 clause would contravene California public policy); *Gagnon v. Ryerson Inc.*, 2007 U.S. Dist.
 24 LEXIS 9355, *9-10 (D. Or. Feb. 1, 2007) (granting the defendants’ motion to dismiss for
 25 improper venue because the plaintiff had failed to meet its burden of showing that enforcement of
 26 the forum selection clause was unreasonable and rejecting the plaintiff’s argument that Oregon
 27 public policy regarding noncompete agreements renders the forum selection clause unenforceable
 28 because the plaintiff “does not present any evidence that Illinois law provides less protection than

1 Oregon law").

2 Based upon the foregoing specific analysis related to § 25701, and based upon the
 3 foregoing body of persuasive Ninth Circuit authority, Plaintiff has failed to meet its burden of
 4 showing how enforcement of the forum selection clause is unreasonable.

5 **2. Section 25701 is irrelevant since Plaintiff has not asserted a claim
 6 under California's Corporate Securities Law of 1968.**

7 Plaintiff acknowledges that it has not stated any claim under California's Corporate
 8 Securities Law of 1968. Opp'n at 9:22-24. Instead, Plaintiff maintains that while it "has not yet
 9 stated claims under California's Corporate Securities Law of 1968, it has plead facts sufficient to
 10 state a claim under Section 25400(d) of that law." Opp'n at 9:22-24. Unfortunately, this "sleight
 11 of hand" will not save the day.

12 A California appellate court has unequivocally rejected a similar attempt by plaintiffs to
 13 avoid enforcement of a forum selection clause based upon § 25701. In *Intershop*
 14 *Communications AG v. Superior Court*, 104 Cal. App. 4th 191 (2002), the plaintiffs sought to
 15 avoid enforcement of a mandatory forum selection clause in a stock options exchange agreement
 16 by arguing that "enforcement of the forum selection clause would violate California public policy
 17 reflected in Corporations Code section 25701." *Intershop Commc'ns*, 104 Cal. App. 4th at 195,
 18 200. The appellate court rejected this argument because "[t]he flaw in the argument is that
 19 plaintiff no longer has any cause of action based on a violation of California's securities laws."
 20 *Id.* at 200. The Plaintiff here is in the same position, and this Court should reject Plaintiff's §
 21 25701 argument for the same reason.

22 **3. Choice of law considerations are not before the Court on this motion.**

23 Plaintiff relies completely on the *Hall* decision in the hope that the Court will confuse
 24 choice of law considerations with choice of forum considerations and adopt the rationale of that
 25 decision. However, as the following cases establish, district courts in the Ninth Circuit have ruled
 26 that federal courts do not consider choice of law issues when analyzing the enforceability of a
 27 forum selection clause.

28 As explained above, the *Hall* court considered a choice of law provision in assessing

1 whether enforcement of a forum selection clause in the same agreement was unreasonable based
 2 on California public policy. *Hall*, 150 Cal. App. 3d at 413. According to the *Hall* court, “a
 3 determination as to the validity of the choice of law provision is [a] prerequisite to a
 4 determination of whether the forum selection clause should be enforced” when it is apparent that
 5 the choice of law could prejudice the rights of California citizens and contravene California
 6 public policy. *Id.* at 416.

7 However, several federal district courts have uniformly ruled that choice of law clauses
 8 are not relevant when they are analyzing the enforceability of a forum selection clause. For
 9 example, in *Swenson v. T-Mobile USA, Inc.*, 415 F. Supp. 2d 1101 (S.D. Cal. 2006), the plaintiff
 10 sought to avoid enforcement of a forum selection clause by arguing that it would contravene the
 11 public policy articulated in California Business and Professions Code section 16600 relating to
 12 non-compete provisions in employment contracts. *Swenson*, 415 F. Supp. 2d at 1104. The court
 13 rejected this argument because the plaintiff “cleverly, but impermissibly, combin[es] the forum
 14 selection and choice of law analyses when she argues that enforcement of the forum selection
 15 clause results in the application of a Washington law violative of California public policy.” *Id.*
 16 “The question is not whether the application of the forum’s law would violate the policy of the
 17 other party’s state, but rather, whether enforcement of the forum selection agreement would
 18 violate the policy of the other party’s state *as to the forum for litigation of the dispute.*” *Id.* at
 19 1105 (emphasis added). Because enforcement of the forum selection clause in *Swenson* “does not
 20 contravene a California policy as to forum,” the forum selection clause was valid. *Id.*

21 *See also Nureau Ink*, 2006 U.S. Dist. LEXIS 87240 at *22-24 (finding the reasoning of
 22 *Swenson* persuasive and declining to consider the choice of law clause before deciding the
 23 enforceability of the forum selection clause and rejecting application of *Hall* to the case because
 24 “federal law governs the analysis of the effect and scope of forum selection clauses”; if *Hall*
 25 applied, it “would force courts to examine the merits of the underlying case in order to determine
 26 if the forum selection clause should be enforced”); *Multimin USA*, 2006 U.S. Dist. LEXIS 33624
 27 at *17-18 (rejecting the plaintiffs argument that “a strong public policy requires the court to keep
 28 this action in California because [the contract forum] does not provide a statutory basis for

1 Plaintiffs' trade secret claims;" "The forum selection clause determines where the case will be
 2 heard. It is separate and distinct from choice of law provisions that are not before the court.");
 3 *Whipple Indus., Inc. v. Opcon AB*, 2005 U.S. Dist. LEXIS 27564, *27, 29, 30-31 (E.D. Cal. Sept.
 4 7, 2005) (rejecting the plaintiff's argument that enforcement of the forum selection clause "would
 5 contravene California's strong public policy against restraints on trade" articulated in California
 6 Business and Professions Code section 16600; there is nothing in section 16600 that relates to
 7 venue and "[t]he forum selection clause determines where the case will be heard [and] is separate
 8 and distinct from the choice of law provisions which, [the plaintiff] acknowledges, are not before
 9 this court; the court also determined that the case was unlike the facts in *Hall* in which both issues
 10 of choice of law and choice of forum were before the court).

11 Since federal district courts in the Ninth Circuit have declined to consider choice of law
 12 provisions in assessing the reasonableness of a forum selection clause and have rejected the *Hall*
 13 rationale, this Court should do the same and not apply the *Hall* analysis to the facts of this case.

14 **D. Plaintiff's Claims Have Nothing To Do With The Stockholders Agreement**
And There Is No "Conflict" With The Subscription Agreement.

16 Plaintiff also argues that the policy behind the enforcement of a forum selection clause is
 17 frustrated by certain unidentified conflicts that purportedly exist between the forum selection
 18 clause set forth in the Subscription Agreement and the forum selection clause set forth in the
 19 Stockholders Agreement. In this regard, Plaintiff asserts:

20 Forum selection clauses should provide parties to a contract with a
 21 measure of orderliness and predictability.... Here, the existence of
 22 conflicting choice of forum and choice of law provisions in separate
 23 agreements exacerbates, rather than dispels, such confusion.
 Indeed, the objectives of the provisions themselves are utterly
 unclear.

24 ***

25 Duke Advantage has made claims that implicate both agreements,
 26 namely breach of fiduciary duty and accounting inspection claims
 27 involving the rights of a shareholder, as well as a claim for
 28 fraudulent inducement to purchase securities. Both agreements are
 thus related to Duke Advantage's investment in CorMatrix and
 status as a CorMatrix shareholder.

1 Opp'n at 10:6-13 and 19-24.

2 Plaintiff's assertion that it has made claims that implicate both agreements is not an
 3 accurate statement. Its claims have absolutely nothing to do with the terms and conditions of the
 4 Stockholders Agreement. Rather, the claims asserted by Plaintiff only implicate the terms and
 5 conditions of the Subscription Agreement. Further, its assertion that these purportedly
 6 "conflicting" choice of forum provisions create confusion and unpredictability flies directly in the
 7 face of the clear terms and conditions of each agreement and their respective scope and purpose.
 8 Since each of these agreements have a clear purpose and scope that are distinctly dissimilar from
 9 one another, no such "confusion and unpredictability" can possibly exist.

10 The Subscription Agreement only concerns itself with the initial or original purchase and
 11 sale of CorMatrix common shares between CorMatrix and Plaintiff. The Subscription Agreement
 12 plainly only concerns itself with the offer and sale of securities that are not registered with either
 13 the Securities and Exchange Commission or any other governmental agency charged with
 14 regulating the offering and sale of securities. The Subscription Agreement therefore only
 15 concerns itself with the purchase and sale of an unregistered security. Its obvious scope and
 16 purpose is to insure that the transaction fully complies with the "blue sky laws" enacted in the
 17 various states in which these securities are being offered for sale. As such, Plaintiff's claims for
 18 breach of fiduciary duty and fraudulent inducement can only arise out of or implicate the terms
 19 and conditions of the Subscription Agreement because they admittedly are only related to the
 20 "purchase and sale" transaction effectuated by Plaintiff.

21 In contrast, the Stockholders Agreement only concerns itself with the transfer and sale of
 22 CorMatrix securities subsequent to the purchase and sale affected by the Subscription Agreement,
 23 or in what is commonly referred to as an "after market transaction." Moreover, since CorMatrix
 24 is not a publicly traded company, the relevant after market consists only of private transactions.
 25 The Stockholders Agreement is thus designed and implemented for the sole purpose of insuring
 26 that CorMatrix's original investors, such as venture capitalist or other angel investors, are
 27 protected to the extent that their original investments are not transferred to unknown third parties,
 28 or to insure that their original investments are not diluted by further transactions or sales. As

1 such, the Stockholders Agreement only regulates and concerns itself with the restricted transfer
 2 and sale of CorMatrix securities by and between a specific universe of original investors (e.g.,
 3 “Founding Stockholders,” “Purdue Research Foundation, Inc.,” “Additional Investors”).

4 These differences also explain their different forum selection provisions. Georgia is one
 5 of the mandatory jurisdictions for the Subscription Agreement because it is the state of
 6 incorporation and principal place of business of CorMatrix -- the issuer of the unregistered
 7 securities covered by the Subscription Agreement. Indiana is the mandatory jurisdiction for the
 8 Shareholder’s Agreement because it is the state of residence of Purdue Research Foundation, Inc.
 9 -- the initial investor in CorMatrix who licensed its technology to CorMatrix.

10 In this context, it is apparent that no “confusion or unpredictability” exists between these
 11 forum selection provisions. As such, Plaintiff’s arguments in this regard must fail.

12 **E. Defendants’ Alleged “Ties” With This Forum Have Nothing To Do With This**
 13 **Motion.**

14 Plaintiff cites to no authority for the proposition that the defendants’ contacts with
 15 California are relevant to the determination of whether a forum selection clause is reasonable and
 16 enforceable. Rather, because the Subscription Agreement contains a forum selection clause and it
 17 is on that basis that the defendants seek a motion to dismiss, it is unnecessary for this Court to
 18 determine whether venue is proper here based on the defendants’ “ties” to California. *See, e.g.,*
 19 *Multimin USA*, 2006 U.S. Dist. LEXIS 33624 at *10-11 (“In this action, it is unnecessary for the
 20 court to determine [as provided for in 28 U.S.C. section 1391(b)] if a substantial part of the events
 21 occurred in California rather than Kansas or Texas, where the allegedly trademark infringing
 22 material is manufactured. The Agreement between the parties contained a forum selection clause
 23 [which provided that venue is proper in Tarrant County, Texas].”). This motion to dismiss is
 24 unlike a motion to transfer pursuant to 28 U.S.C. section 1404(a) in which the court may
 25 consider, among other factors, “the respective parties’ contacts with the forum” and “the contacts
 26 relating to the plaintiff’s cause of action in the chosen forum.” *Jones*, 211 F.3d at 498.

27 **III. CONCLUSION**

28 For the foregoing reasons, Plaintiff has failed to meet its heavy burden of overcoming the

1 presumption of validity of the forum selection clause in the Subscription Agreement.

2 Accordingly, the Complaint should be dismissed for improper venue as to all the defendants.

3 DATED: July 20, 2007

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4

5 By: *s/ Robert Schaberg*

6 ROBERT E. SCHABERG

7

8 Attorneys for Defendants

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